Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

1986

# Craig Food Industries, Inc. v. George Weihing and Arlene Weihing, dba Green River Taco Time : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Stephen W. Cook; Cook and Wilde P.C.; Attorney for Appellant.
David J. Knowlton; Attorney for Respondent.

Recommended Citation
Brief of Appellant, *Craig Food Industries v. George Weihing and Arlene Weihing*, No. 860192.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1067

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

A
DOCKET NO. 860192 SUPREME COURT OF UTAH

STATE OF UTAH

---

| | | |
|---|---|---|
| CRAIG FOOD INDUSTRIES, INC., | ) | |
| | ) | |
| Plaintiff and Respondent, | ) | BRIEF OF APPELLANT |
| | ) | |
| v. | ) | |
| | ) | 860192-CA |
| GEORGE WEIHING and ARLENE WEIHING, dba GREEN RIVER TACO TIME, | ) | No. 860213 |
| | ) | |
| | ) | 13 b |
| Defendants and Appellants. | ) | |

---

Appeal from the Second District Court in and for Weber County, State of Utah, the Honorable John F. Walquist presiding.

STEPHEN W. COOK, ESQ.
COOK & WILDE, P.C.
Attorneys for Appellant
6925 Union Park Center
Suite 490
Midvale, Utah 84047

David J. Knowlton, Esq.
Attorney for Respondent
2910 Washington Blvd., #305
P.O. Box 1579
Ogden, Utah 84402

FILED
JUL 10 1986

SUPREME COURT OF UTAH

STATE OF UTAH

| | | |
|---|---|---|
| CRAIG FOOD INDUSTRIES, INC., | ) | |
| | ) | |
| Plaintiff and Respondent, | ) | BRIEF OF |
| | ) | APPELLANT |
| v. | ) | |
| | ) | |
| GEORGE WEIHING and ARLENE | ) | |
| WEIHING, dba GREEN RIVER TACO | ) | No. 860213 |
| TIME, | ) | |
| | ) | 13 b |
| Defendants and Appellants. | ) | |

Appeal from the Second District Court in and for Weber County, State of Utah, the Honorable John F. Walquist presiding.

STEPHEN W. COOK, ESQ.
COOK & WILDE, P.C.
Attorneys for Appellant
6925 Union Park Center
Suite 490
Midvale, Utah 84047

David J. Knowlton, Esq.
Attorney for Respondent
2910 Washington Blvd., #305
P.O. Box 1579
Ogden, Utah 84402

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

SUPREME COURT OF UTAH

STATE OF UTAH

| | | |
|---|---|---|
| CRAIG FOOD INDUSTRIES, INC., | ) | |
| | ) | |
| Plaintiff and Respondent, | ) | BRIEF OF APPELLANT |
| v. | ) | |
| | ) | |
| GEORGE WEIHING and ARLENE WEIHING, dba GREEN RIVER TACO TIME, | ) | No. 860213 |
| | ) | 13 b |
| Defendants and Appellants. | ) | |

## STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN ITS CONSTRUCTION OF SECTION 18 OF THE FRANCHISE AGREEMENT.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING PAROL EVIDENCE AND IRRELEVANT AND IMMATERIAL EVIDENCE FOR THE PURPOSE OF CONSTRUING SECTION 18.

III. WHETHER THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF PAROL EVIDENCE AND EXPERT TESTIMONY ON THE MEANING AND INTENT OF SECTION 18 OF THE FRANCHISE AGREEMENT.

IV. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THE APPELLANT WOULD BE UNJUSTLY ENRICHED IF NOT REQUIRED TO JOIN THE TEN STATE AREA ADVERTISING TRUST EVEN THOUGH THE RESPONDENT DID NOT PLEAD OR PROVE A CLAIM OF UNJUST ENRICHMENT.

V. WHETHER ATTORNEY'S FEES SHOULD BE AWARDED THE APPELLANT IF HE SUCCEEDS ON APPEAL AS THE "PREVAILING PARTY."

VI. WHETHER THE APPELLANT OR RESPONDENT IS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY.

## STATEMENT OF THE CASE

This is an appeal from a judgment rendered in favor of the Respondent for an alleged breach of franchise agreement involving whether or not the Appellant is obligated to join an advertising co-op known as the Ten State Area Advertising Trust and pay 2% of his gross profits to such entity.

The Respondent's complaint alleged the Appellant had breached a franchise agreement by refusing to pay a percentage of gross profits and by failing to provide detailed financial statements each month. (R.1). The Respondent sought monetary relief and attorney's fees.

At trial the Respondent conceded that the detailed financial statements were insignificant and the central issue was whether the Appellant was required to join the advertising co-op and to pay a percentage of gross income. The trial court permitted the introduction of parol evidence over Appellant's objection and ruled in favor of the Respondent by entering a declaratory judgment obligating the Appellant to join the Ten State Area Advertising Trust and ordering the payment of 2% of Appellant's gross sales per month, by granting a judgment in favor of the Respondent representing 2% of gross sales for the period of April 8, 1983 through December 31, 1985,

by determining the Appellant had breached the franchise agreement for failing to provide monthly financial statements and awarding $1.00 nominal damage, and by awarding the Respondent $2,800.00 in attorney's fees as the prevailing party.

There is no challenge on appeal to the trial court's finding that the Appellant had failed to provide monthly financial statements or the $1.00 nominal award. There is no issue that the Appellant is current on all royalty payments due.

## STATEMENT OF FACTS

Appellant is the operator of a "Home Town Taco Time" fast food restaurant located in Green River, Emery County, Utah. Green River is a town of approximately 1,200 inhabitants and is located in southeastern Utah approximately 186 miles from Salt Lake City and 106 miles from Grand Junction, Colorado. (T. 615). The Appellant and the Respondent entered into the Home Town Taco Time Franchise Agreement on May 4, 1977. (Ex. 5-P). The Appellant paid $16,000.00 as an initial deposit and agreed to pay 3½% royalty fees per month. (T.634 and Ex. 29 D). Prior to signing the Franchise Agreement, the Respondent led Appellant to believe that the deposit and royalty was going to be used, in part, for uniform advertising (T.

636). No one told the Appellant that he would be required to join any advertising co-op or pay any further fees. (T.637).

The Franchise Agreement contains the following significant language:

* * * *

RECITALS

"A. Taco Time International, Inc., an Oregon Corporation, (The Company) has over a period of time and at considerable expense developed an established and uniform and unique method of operation, customer service, advertising, publicity, processes, techniques and technical knowledge in connection with the restaurant business, the outlets for which are known as and named 'Taco Time'."

* * * *

"1. Franchise. CFI hereby grants, sells, and conveys to the Operator the exclusive right to utilize the above-mentioned methods and system, together with the use of available Company trademarks, tradenames, techniques, advertising, processes, receipts and designs ... ."

* * * *

"18. Advertising. At all times the Operator will conduct the business which is the subject of this franchise under the name 'TACO TIME' and will advertise his 'TACO TIME' restaurant and its services on a scale consistent with the volume of his business and in keeping with practical business practices. In so advertising, the Operator will utilize all advertising formats, formulas, and programs furnished to the Operator by CFI. It is understood that CFI may desire to cause Operators in a given area to join into a uniform program of promoting given products or services either through sales, discounts, specials or other promotional devices. The Operator will participate in any such procedures upon the request of CFI."

* * * *

"32. Litigation Expense. In the event that an action at law or suit in equity is brought to establish, obtain or enforce any right by either of the parties to this agreement, the prevailing party in such suit or action, both in the trial and appellate courts, shall be entitled to a reasonable attorney's fee to be recovered from the other party as well as that party's costs and disbursements incurred in such suit or action."

* * * *

"35. Entire Agreement. This agreement constitutes the entire agreement of the parties (into which all prior negotiations, commitments, representations, and undertakings with respect to the subject matter hereof are merged) and there are no oral or other written understandings or agreements between the parties hereto relating to the subject matter hereof." (All emphases added).

* * * *

The Respondent did not produce any witnesses concerning the negotiations which led to the Franchise Agreement. However, it admitted through its President Ed Craig that the Franchise Agreement was a form agreement prepared by Taco Time International and furnished to the Respondent (T. 406), admitted the Respondent had never interpreted Section 18 regarding advertising (T. 451), admitted Section 18 was silent concerning the obligation to join a separate entity or to pay 2% for advertising (T. 452-453), and admitted the Respondent has never requested that the Appellant himself advertise (T. 454-10).

No issues arose under the Franchise Agreement from

1977 until February 9, 1979. At that time the Respondent wrote and asked the Appellant to join in a new Taco Time Advertising Trust. A separate agreement was enclosed which called for the Appellant to pay 1/2 of 1% of gross into the Trust. (Ex. 7-P). The Appellant refused. (T. 421). The Respondent wrote again on June 26, 1979, (Ex. 9-P) and requested again, and again the Appellant refused to participate.

In June 1981, a new and separate non-profit Utah advertising trust known as the Ten State Area Advertising Association, Inc. (herein "Trust") was created for the purpose of advertising on behalf of its Taco Time members. (T. 425, Ex. 39 D). Eligibility for membership is limited to those who enter into a separate written subscription agreement between the Trust, the Respondent, and an operator which calls for the operator to pay 2% of gross sales into the trust. (Exh. 37 D). This subscription agreement also states in Paragraph 7 that, in order for the agreement to be effective, at least 75% of the franchised operators must agree to be solicited and join the Trust.

The Respondent admits there is no connection between it and the Trust, that the Trust is a separate entity, that the Respondent does not control the Trust, and that

the Trust was not even contemplated in 1977. (T. 436-437, testimony of Ed Craig, President). The Respondent admitted, almost astonishingly that although it had not been damaged by the Appellants refusal to join the advertising co-op, it was seeking damages on which the Respondent believed was due the Trust. (T. 449). Although the Respondent claims in this action the advertising program was compulsory and not voluntary (T. 427), it admitted that the advertising program was described as a "voluntary contractual agreement" to all its operators in correspondence to its operators dated November 23, 1981 (Exh. 14-P). The Respondent's President, Ed Craig, further admitted on cross that participation in the Trust was voluntary. (T. 456, 458).

No additional action on this issue occurred until March 23, 1983. At this time the Respondent sent Appellant a letter demanding the Appellant join the Trust. (Exh. 19-P). The Appellant did not respond and the present action was filed on February 4, 1984 (R. 1). The Respondent alleged in its complaint that the Appellant had failed to participate in the advertising program of the Trust and had failed to pay a percentage due the trust. The Complaint sought damages and attorney's fees. The Respondent did not set forth any causes of action for

unjust enrichment or for declaratory relief.

At trial the Defendant offered and the Court received evidence dehors the Franchise Agreement over the Appellant's objections concerning parol evidence and relevancy and materiality. For example, the Court received Exhibits 1-P (T. 395), 2-P (T. 395) 27-P (T. 402), and 3-P (T. 404) over such objections; and, it received expert testimony relative to what the industry standards are now over such objections and over further foundational objections. (T. 416, 417, 473, 501, 668, 791 and others). The Appellant further objected, without success, to testimony relative to unjust enrichment (T. 713), to testimony relative to what other operators do and pay (T. 668), and to testimony relative to the Respondent's alleged damages due to its failure to respond to discovery requests (T. 537).

At trial, Dan Jones, Secretary Treasurer, Director, and House Counsel of Respondent testified that the Franchise Agreement did not require the Appellant to pay 2% of gross receipts for advertising. (T. 556). He testified that the Appellant had an obligation to advertise on a scale consistent with volume and practical business practices but not to pay any sums to the Trust. (T. 557). He testified the Appellant had not refused to

join the Trust --- only to pay 2% of gross receipts (T. 559).

The Appellant produced expert evidence through Gerald Shupe, P.A., that the Appellant advertised on a scale consistent with the volume of his business and in keeping with sound business practices. (T. 581). Mr. Shupe was the Appellant's accountant for over 20 years and was familiar with small businesses in Southeastern Utah. (T. 578). Mr. Shupe testified that the Appellant's level of advertising was consistent with other proprietor's generally in Southeastern Utah (T. 580).

Naomi Dumas, proprietor of the "Chow Hound" and chief competitor of the Appellant testified that she was aware of the Appellant's advertising expenditures and they were not inconsistent with hers. (T. 621-623). She believed she advertised according to sound business practices for such businesses in Southeastern Utah and so did the Appellant. (T. 623).

The Appellant and his wife, Arlene Weihing, both testified that the methods and means of advertising in Southeastern Utah were sparse. Radio and T.V. and other electronic media advertising were impractical. (T. 642 to 644 and T. 701 to 705). The Appellant advertised in local newspapers (T. 701), high school yearbooks, etc. (T. 701).

Also, discounts, door prizes, free products, etc., were utilized. (T. 704). The Respondent's own expert agreed that electronic media advertising would be impractical for the Appellant. (T. 485), 487). Such expert further admitted that the Appellant was doing all practical advertising now except, perhaps, joining an advertising co-op or, possibly, erecting a billboard. (T. 488).

Following the trial, the Court entered a Memorandum Decision (R. 354). The Court considered the Appellant's obligation to join the Trust at Paragraph 5:

> "... The Court considers the Plaintiff does have the authority under the contracts here in question, and has construed, in light of the general business climate and industry here involved, to empower the Plaintiff to require that the Defendant utilize the advertising program submitted to it ... ."

The Court further held that the Appellant was required to pay 2% of his gross receipts to the Respondent from 15 days past March 23, 1983, to the present. The Court's rationale is otherwise found in Paragraph 16 of its Memorandum Decision, and is underscored by concepts of the Respondent's expense in creating a favorable image and the Appellant's unjust enrichment by not being required to contribute. The Court found that the Appellant's advertising was "good will" and would not allow a credit against the Respondent's damages. (Ibid). The Court

entered a Declaratory Judgment ordering the Appellant to join the Trust, ordering the Defendant to pay 2% of his gross receipts to the Trust, granting a judgment to the Respondent for unpaid 2% monthly amounts apparently found due the Trust, and awarding attorney's fees to the Respondent as the "prevailing party."

## SUMMARY OF ARGUMENTS

The Appellant respectfully submits that Section 18 of the Franchise Agreement is clear and unambiguous. It is not susceptible to a construction mandating the Appellant's participation in an advertising co-op and the payment of 2% of the Appellant's gross profits to such co-op. The Trial Court erred in its construction of Section 18 and wrongfully permitted parol and extrensic evidence on the issue. The Trial Court improperly concluded that the Appellant may be forced to join the advertising co-op on the principle of unjust enrichment and the Court erred in awarding the Respondent monetary damages where no damages were demonstrated.

## POINT I

### THE TRIAL COURT ERRED IN ITS CONSTRUCTION OF SECTION 18 OF THE FRANCHISE AGREEMENT.

The Appellant contends that Section 18 is clear and unambiguous. Section 18 does not require the Appellant to join any advertising co-op or to pay 2% of the Appellant's

gross receipts to such entity:

> "18. Advertising. At all times the Operator will conduct the business which is the subject of this franchise under the name 'TACO TIME' and will advertise his 'TACO TIME' restaurant and its services on a scale consistent with the volume of his business and in keeping with practical business practices. In so advertising, the Operator will utilize all advertising formats, formulas, and programs furnished to the Operator by CFI. It is understood that CFI may desire to cause Operators in a given area to join into a uniform program of promoting given products or services either through sales, discounts, specials or other promotional devices. The Operator will participate in any such procedures upon the request of CFI." (Emphasis added).

Several observations may be made concerning the language. First, the Appellant's obligation to advertise arises solely out of the first and second sentences. The obligation is one imposed upon the Appellant and requires him to advertise on a scale consistent with his business and in keeping with practical business practices. The Trial Court did not find the Appellant breached this obligation. Indeed it could not. The testimony was conclusive that the Appellant was advertising consistent with practical business practices under the circumstances -- with the exception that joining an advertising co-op might be an option which, if required, may be beneficial.

Second, the Appellant's obligation is to utilize all advertising formats, formulas, and programs "furnished to the Operator by CFI." The evidence was conclusive that the Appellant utilized all advertising furnished to him by CFI. The trial court did not find the Appellant breached

this obligation.

Third, regarding the Appellant's obligation to join programs as described in the last two sentences of Section 18, the language is specific and restrictive. The initial restriction concerns its application: it applies to "operators in a given area." A "given area" cannot be construed, as the trial court must have concluded, to be the entire ten states in which the Respondent operates. The next restriction concerns the operators duty: the operator must "promot[e] given products or services." This must certainly mean the Appellant must promote "specific" products or services as opposed to paying a percentage of gross sales. The last restriction in these two sentences refers to the method or manner that the operator must promote: he must do so through "sales, discounts, specials, or other promotional devices." This language cannot possibly be construed to mean an operator must join a trust and pay a percentage of his sales.

The plain unambiguous language sets forth the Appellant's contractual obligations. These contractual obligations were not breached by the Appellant. It is impossible to read into the language contained in Section 18 any obligation of the Appellant to join a separate entity and pay 2% of his gross proceeds.

The evidence also supports the view that there is no

obligation under Section 18 for the Appellant to join the Trust. The unrebutted testimony of the Appellant was that he was told by the Respondent the Appellants $16,000 deposit and his 3½% royalty would be used, in part, for advertising. Section 1 of the Franchise Agreement supports this proposition. Also, the Respondent invited the Appellant to participate in different advertising co-op in 1979. (Ex. 7-P). The invitation contained a separate agreement which did in fact have provisions for joining as a member and paying a percentage of gross profits. In addition, within six months after the formation of the Ten States Area Advertising Association, Inc. Trust, Mr. Ed Craig, President, wrote and told all operators that the advertising program was a "voluntary contractual agreement." (Ex. 14-P, T 456, 458). Moreover, the advertising trust was not even contemplated in 1977 when the Franchise Agreement was signed. (T. 436-437). Furthermore, the advertising trust would have ceased to exist by its own terms had not 75% of the operators voluntarily joined by separate written subscription agreements. (Ex. 37 D). Lastly, the evidence showed that the language in Section 18 in later generations of franchise agreements does call for a mandatory membership in the Trust as well as for a percentage fee. (Exh. 40-D, 41-D, 42-D, 43-D and T. 443-8 to 23).

The Appellant respectfully submits the Trial Court erred in its construction of Section 18 of the Franchise Agreement.

## POINT II

THE TRIAL COURT ERRED IN ADMITTING PAROL EVIDENCE AND IRRELEVANT AND IMMATERIAL EVIDENCE FOR THE PURPOSE OF CONSTRUING SECTION 18.

The Trial Court permitted the following evidence to be admitted over the Appellant's objections:

| Evidence | Description | Objection |
|---|---|---|
| 1-P | Franchise Deposit Receipt | 395 |
| 2-P | Pro-Forma Assumptions | 399 |
| 27-P | Worksheet for Pro-Forma | 402 |
| 3-P | Pro-Forma for Appellant | 403 |
| 4-P | Appellant's Financial Statement | 405 |
| Testimony | Ed Craig, on subject of competitor's advertising standards | 416 |
| Testimony | Gordon Jacox, as expert on subject of industry standards | 473 |
| Testimony | Gordon Jacox, as expert, on his interpretation of Franchise Agreement | 493 |
| Testimony | Marcia Walke, as Director of Trust, on subject of industry standards | 501 |
| Testimony | Dan Jones, as attorney for Respondent on subject of industry standards | 541 |

Other citations could be provided; however, the above is

demonstrative of the Appellant's consistent objection to parol evidence, irrelevant and immaterial evidence, and opinion evidence adduced without proper foundation.

The Trial Court did in fact rely on such evidence in rendering its decision. In Paragraphs 5 and 6 of its Memorandum Decision (R. 356) and in Paragraphs 12 and 13 of its Findings (R. 371), the Court construed the Franchise Agreement "in light of the general business climate and industry here involved." (Id.).

In this case, the Franchise Agreement was an "integrated" contract. Article 35 provides:

> "35. Entire Agreement. This agreement constitutes the entire agreement of the parties (into which all prior negotiations, commitments, representations, and undertakings with respect to the subject matter hereof are merged) and there are no oral or other written understandings or agreements between the parties hereto relating to the subject matter hereof."

Objections based upon the parol evidence rule, rules governing relevancy and materiality, and foundation should have been sustained.

As a general rule, in the absence of fraud, an apparently complete and certain agreement which the parties have reduced to writing should be conclusively presumed to contain the whole argument; and that parol evidence of whatever type should not be received for the purpose of varying or adding to the terms of the written agreement. Erie v. St. Benedict's Hospital, 638 P.2d.

1190 (Utah 1981) (cases cited therein).

In Appellant's view Section 18 is clear and unambiguous. Even if an ambiguity existed, such ambiguity should have been construed against the Respondent because it was the party who chose the terminology and drafted the form agreement. Bryant v. Deseret News Pub. Co., 233 P.2d. 355 (Utah 1951).

The Appellant also claims that evidence pertaining to competitors standards, "industry" standards, or "general business climate," should also be rejected because of relevancy and materiality rules as well. As a general rule the construction of contracts is a legal question and expert testimony such as Mr. Jacox's is not germane. North Point Consol, Irrigation Co. v. Utah & S.L. Canal Co., 16 U 246, 52 P. 168; Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 U. 41, 29 P. 826; 31 Am.Jur.2d. Experts § 69.

Further, what other competitors do in respect to advertising or what other standards exist in the industry is irrelevant and immaterial. Only the clear and unambiguous terms of the contract are material and relevant. The Appellant signed a contract in 1977 and no one told him that he would be bound to any industry standards or "general business climate." No one told him he was contractually bound to perform whatever obligations

are found generally to exist in the fast food industry.

There was no testimony concerning what the standards were in 1977. There is no evidence concerning what the general business climate was in 1977. Foundational objections were properly lodged. Even assuming there was testimony or evidence relating to 1977, there is no connection showing the Appellant was aware of them or agreed to be bound by them.

Under the facts of this case, there is no allegation or finding that the contract is ambiguous. There is no allegation or finding of fraud. There is no request for a declaratory judgment concerning what the contract means. The language is clear and susceptible to no other meaning than the plain and ordinary meaning the words convey. The Appellant's objections to the extraneous evidence, dehors the contract, should have been sustained.

## POINT III

THE TRIAL COURT ERRED IN CONCLUDING THE APPELLANT WOULD BE UNJUSTLY ENRICHED IF NOT REQUIRED TO JOIN THE ADVERTISING TRUST AND PAY THE PERCENTAGE FEE WHERE THE RESPONDENT DID NOT PLEAD OR PROVE A CLAIM OF UNJUST ENRICHMENT.

The Respondent did not plead a claim for unjust enrichment. (R. 1-17). Respondent did not prove such a claim or request his complaint be amended to include such a claim. Unjust enrichment was not mentioned in the Respondent's Opening Argument nor requested in closing.

The only time any reference was made to unjust enrichment, the Respondent promptly objected. (T. 713).

Nevertheless, the Trial Court considered and found that the Appellant's failure to join the Ten State Area Advertising Association, Inc., advertising trust "would have the effect of unjust enrichment." Factually, the Trust has not historically advertised on behalf of the Appellant. (T. 520, 703). Furthermore, the only advertisement beneficial to the Appellant in Southeastern Utah pivots around only name recognition and trade-mark recognition which must certainly be part of Recital A and Paragraph 1 of the Franchise Agreement. What else could be found to be included within such provisions.

Decrees regarding equity must have a basis in the pleadings and the evidence. 61 A Am.Jur.2d Pleadings 382. Notice pleading, of course, is nominally required -- but some sort of pleading and proof is mandatory. Such was not present here. A party's proof cannot materially vary from his allegations and the judgment must respond to the issues raised by the pleadings. Ibid. Utah has always recognized these generally referenced rules. In Stockyards Nat. Bank of South Omaha v. Bragg, et al, 245 P.966 (Utah 1926), the Court held that a petition or pleading of "some kind" was the jurisdictional means of investing a court with power of subject matter to

adjudicate the matter. And, a judgment which is beyond or not supported by the pleadings must fail:

> "It is fundamental that a petition or pleading of some kind is the juridical means of investing a court with jurisdiction of subject matter to adjudicate it, and a judgment which is beyond or not supported by pleadings must fall." Id. at 973.

Also see In re Evans, et al, 130 P. 217 (Utah 1913), and Cooke v. Cooke, 248 P. 83 (Utah 1926). ("These are immutable elements").

The Appellant contends that fundamental fairness requires his opposing party or the Court to verbalize the issues in advance of trial. The Appellant concedes that notice pleading may be sufficient; however, some pleading is essential. In this case, neither the Appellant nor the Respondent understood that unjust enrichment was involved in this litigation.

The Respondent did not prove a claim of unjust enrichment requiring restitution at trial either. As cited by this court previously, "Unjust enrichment does not apply to every circumstance where one has been benefited by another's detriment." General Leasing Co. v. Manivest Corp., 667 P.2d 596 (Utah 1983). (Also see, cases cited therein). This case does not involve obtaining money or property under false pretenses. It does not involve a factual situation where property is provided upon request. Acquiescence in a direct benefit

has not occurred where a trier of fact can appropriately find an implied contract to pay its reasonable value. Here, the Appellant openly refused to join the Trust. The Trust did not advertise directly for the Appellant. This is not a case where benefits were conferred upon the Appellant under mistake and which equity requires a recompense. The benefits, if any, were officiously provided.

The Appellant respectfully submits that the trial court erred in citing unjust enrichment as a basis for its decision.

## POINT IV

THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT DAMAGES IN THE ABSENCE OF ANY PROOF OF DIRECT AND PROXIMATE DAMAGES.

The Respondent admitted that the Ten State Area Advertising Association, Inc. was a separate entity over which it had no control. (T. 436). It admitted that this advertising cooperative was not even contemplated in 1977 when the Franchise Agreement was signed. (T. 436). Upon cross-examination, the President of the Respondent, Ed Craig, admitted that it had not been damaged due to the Appellant's failure to join the advertising co-op and that the damages sought under the Respondent's Complaint (R. 1), were sums allegedly due the Ten State Area Advertising Association, Inc. (T. 449).

The Appellant contends that the Respondent failed to prove $1.00 in damages. There is no testimony or any exhibits which show the Respondent suffered any loss. The lower Court found that the Appellant had to contribute 2% of its gross profits to the Trust but then awarded over $4,000.00 to the Respondent. The Trust was not a party to these proceedings; and, even if it were, the Trust could not have shown the Appellant breached any agreements with it. There are none. Indeed, the trial court did not even order the Respondent to pay over the alleged damages to the Trust.

The Appellant believes the Lower Court ignored the rules set forth in Turtle Management Inc. v. Haggis Management, 645 P.2d. 667 (Utah 1982). In Turtle, the Court established a tripartite test in establishing damages. First, has a legal right of the complainant been invaded? Second, is there a causal connection between the legal wrong suffered and the damages claimed? Third, is there sufficient certainty so that speculation is avoided. Id. at 670. In the case at hand, there is no connection between the Trust and the Respondent. How can the Respondent pocket the fees allegedly due the advertising trust?

In conclusion the Appellant submits that the

reasoning, if any, which justifies any view in the Respondent's favor, disintegrates at this level. On the one hand, there is no nexus or agreement between the Trust and the Appellant at all. On the other hand the Lower Court awarded the Respondent damages due the Trust. However, there is no nexus or contract between the Respondent and the Trust and the latter isn't even a party to these proceedings.

The Appellant earnestly believes an error occurred at the bench below. No damages to the Respondent were proved and none should be awarded.

## POINT V

ATTORNEY'S FEES SHOULD BE AWARDED THE APPELLANT IF HE SUCCEEDS ON APPEAL AS THE "PREVAILING PARTY"

Assuming that the Appellant is successful on appeal, the Appellant should be awarded attorney's fees as the "prevailing party." Paragraph 32 of the Franchise Agreement calls for attorney's fees:

> "32. Litigation Expense. In the event that an action at law or suit in equity is brought to establish, obtain or enforce any right by either of the parties to this agreement, the prevailing party in such suit or action, both in the trial and appellate courts, shall be entitled to a reasonable attorney's fee to be recovered from the other party as well as that party's costs and disbursements incurred in such suit or action."

The Appellant respectfully requests this Court to remand for purposes of awarding attorney's fees to the

Appellant if it is successful on appeal.

## CONCLUSION AND RELIEF SOUGHT

The Appellant avers that Section 18 of the Franchise Agreement is clear and unambiguous. There is no requirement for the Appellant to join the Ten State Area Advertising Association, Inc. There is no language which even suggests the Appellant is obligated to pay 2% of his gross profits to the separate entity. The Trial Court erred in its construction of Section 18, erred in admitting parol and extrinsic evidence to construe Section 18, and erred in awarding damages allegedly due the advertising trust to the Respondent.

The Appellant seeks a reversal of the Trial Court's Judgment regarding the Appellant's obligation to join the Trust, regarding the Appellant's obligation to pay 2% of his gross profits to the Trust, and regarding the damages found due. The Appellant seeks further a remand for the purposes of assessing attorney's fees as the prevailing party.

DATED this 8 day of July, 1986.

STEPHEN W. COOK,
Attorney for Appellant
COOK & WILDE, P.C.
6925 Union Park Center
Suite 490
Midvale, Utah 84047

CERTIFICATE OF DELIVERY

I certify that I hand delivered ten (10) copies of the foregoing Brief of Appellant to The Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah, 84114, this 8th day of July, 1986.

I further certify that I mailed, postage prepaid, three (3) copies of the foregoing Brief to David J. Knowlton, Esq., Attorney for Respondent, 2910 Washington Blvd., #305, Ogden, Utah 84402, this 8th day of July, 1986.

I certify that I hand delivered ten (10) copies of the corrected Brief of Appellant to The Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah, 84114, this 10 day of July, 1986.

I further certify that I mailed, postage prepaid, one (1) complete corrected copy of the foregoing Brief, together with three (3) copies of the corrected pages, to David J. Knowlton, Esq., 2910 Washington Blvd., #305, Ogden, Utah, 84402, this 10 day of July, 1986.

"HOMETOWN TACO TIME"

# Franchise Agreement

Green River, Utah
location

THIS AGREEMENT made by and between CRAIG FOOD INDUSTRIES, INC., a Delaware corporation, hereinafter designated as CFI, and George H. Weihing

:inafter designated as the Operator, WITNESSETH:

## RECITALS

A. TACO TIME INTERNATIONAL, INC., an Oregon corporation, (The Company) has over a period of time and at considerable expense developed and established a uniform and unique method of operation, customer service, advertising, publicity, processes, techniques and technical knowledge in connection with the restaurant business, the outlets for which are known as and named "TACO TIME." The Company has caused the trademark "TACO TIME" to be registered with the United States Patent Office and the Canadian Department of Consumer and Corporate Affairs. In addition, The Company has obtained other registrations to enhance and protect the "TACO TIME" image.

B. The developments of The Company as recited above are of considerable value. The Operator recognizes that it is of importance to The Company and all of its other Operators to maintain the development of The Company's methods in a uniform and distinctive manner, thereby allowing the Operator and all other Operators of The Company to enjoy a public image and reputation greatly in excess of that which any single Operator could establish.

C. The Company has heretofore designated CFI as its area licensor in the area covered by this agreement. This agreement is, therefore, between CFI and the Operator. However, neither this agreement nor any of the rights or duties of the parties hereto shall

have any force or effect until this agreement is approved hereon by The Company, which approval is a condition precedent to this agreement.

D. The Operator desires to establish a "TACO TIME" restaurant and CFI is willing to grant the Operator the right to do so under the terms, conditions and provisions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises, the mutual promises of the parties herein exchanged and other good and valuable consideration, the parties agree as follows:

1. Franchise. CFI hereby grants, sells and conveys to the Operator the exclusive right to utilize the above-mentioned methods and system, together with the use of available Company trademarks, tradenames, techniques, advertising, processes, recipes, and designs at the following location:

| | | |
|---|---|---|
| State | - | Utah |
| County | - | Emery |
| City | - | Green River |
| Address | - | 75 West Third Avenue |

The Operator shall have the exclusive right at the above address to establish one "TACO TIME" restaurant and CFI will not establish or cause to be franchised another "TACO TIME" restaurant withinthe area described in exhibit "A" hereto attached, without first obtaining the written consent of the Operator.

2. Consideration. In consideration of the grant of this right to the Operator, the Operator agrees to pay to CFI the sum of $ 10,000.00 . A deposit of $ 5,000.00 , together with this agreement executed by the Operator shall be submitted forthwith by the Operator toCFI. The Operator will pay the balance of the franchise fee to CFI within ten (10) days after receipt by the Operator of this agreement duly approved by The Company. If The Company does not accept this agreement within thirty (30) days after the receipt thereof by The Company, the deposit above mentioned shall be refunded by CFI to the Operator. If The Company does approve this agreement and the Operator should fail to pay the balance of the franchise fee within ten

(10) days after receipt of this agreement duly approved by The Company, the deposit shall be forfeited as liquidated damages and this agreement shall be of no further binding force or effect.

3. Term. The term of this franchise agreement and the period within which the Operator shall have the rights and privileges hereby granted to him shall commence as of the date hereof and shall terminate fifteen (15) years thereafter; except that the term shall be automatically renewed for an additional fifteen (15) years unless either party gives the other written notice to the contrary not less than thirty (30) days prior to the expiration of the first fifteen-year period.

4. Construction. Within ninety(90) days after the date hereof, the Operator will erect or cause to be erected a "TACO TIME" restaurant at the above-mentioned address. Prior to the commencement of any construction thereof or the entering into of any contract for such construction, the Operator will submit to CFI the detailed plans and specifications of the restaurant and related improvements, all of which must be approved by CFI before construction is commenced or a contract for construction is made. The Operator shall not enter into any lease or contractual arrangement covering the address specified above, nor any construction contract without first submitting the same to CFI for approval. It is agreed that it is not the obligation of CFI to select a location for the Operator or to obtain a lease or otherwise acquire such premises for the Operator.

5. Manual. CFI will furnish to the Operator a copy of the "TACO TIME Operator's Manual" (hereinafter referred to as the Manual) which has been prepared by The Company. The Operator will at all times comply with the procedures, recipes and provisions set forth in the Manual. The Manual is incorporated in this agreement to the same extent as if set forth in full herein. The Company reserves the right from time to time to make changes and additions to the Manual in light of experience in order to better promote the continued successful operation of "TACO TIME" restaurants. All such changes in the Manual shall uniformly apply to all Operators.

6. Equipment. The Company has developed certain specialized equipment for utilization in connection with the operation

of "TACO TIME" restaurants. Such equipment must be acquired by the Operator prior to the completion of construction of the Operator's "TACO TIME" restaurant. Such equipment must at all times meet all of the standards and specifications of The Company. Other equipment to be utilized by the Operator in connection with the "TACO TIME" restaurant must be approved by The Company and by CFI. The Operator will purchase, lease or otherwise acquire signs for advertising and identifying the Operator's location as a TACO TIME restaurant. The design of such signs shall be in accordance with those set forth in the Manual.

7. Training. CFI will train the Operator and one employee of the Operator for a period of up to three weeks at such location or locations as may be designated by CFI. This training shall be provided without additional expense to the Operator, with the exception that the Operator shall pay the travel and living expenses of the Operator and the employee of the Operator during such training session. The areas of training shall include customer relations, management, food preparation, operation, control systems, training of personnel, advertising, promotion, maintenance and sanitation. A continuing training program will be provided to the Operator by CFI through the medium of bulletins, manuals, and other literature. It is understood that the training herein mentioned is mandatory and must be availed of by the Operator and one of the Operator's employees.

8. Opening Assistance. Prior to the opening of the Operator's "TACO TIME" restaurant, a representative of CFI will be present to assist the Operator in the selection of employees and their training. This representative will also assist the Operator in establishing local procedures and generally assist in the opening of the restaurant.

9. Standards. During the term of this agreement, the Operator will operate a sanitary, efficient, and high quality restaurant, and so conduct and maintain the restaurant and premises as to not distract from or interfere with the integrity and high standards of The Company. The Operator shall at all times comply with the terms of this agreement, the Manual, and all applicable laws, rules, ordinances and regulations of governmental authorities pertaining to the operation of the Operator's restaurant.

10. Inspection. Either CFI or The Company, or their respective representatives or designees, shall have free access to the premises of the Operator at all times for the purpose of inspecting and examining the same. At the time of such examinations and inspections by CFI, it or its representative or designee shall render advice and assistance to the Operator in the management and conduct of the restaurant. At all times either CFI or The Company, or their respective representative or designee, shall have access to the books and records of the Operator and may audit the same if, in the sole discretion of either CFI or The Company, or their respective representatives or designees, such an audit is deemed necessary. CFI or its representative or designee, will make at lease six (6) inspections during each twelve (12) month period. CFI shall not be responsible for a breach hereof until The Company and CFI have received thirty (30) days' written notice from the Operator specifying the nature of the breach. If during such thirty (30) day period either CFI or The Company, or their respective representatives or designees, makes an inspection, the breach shall be cured.

11. Operating Charge. The Operator shall pay to CFI a sum equal to three and one-half percent (3½ %) of the gross receipts of the Operator resulting from the conduct of the Operator's business from the address mentioned above.

The Operator shall furnish to CFI not later than the 10th day of each calendar month a detailed profit and loss statement prepared upon forms approved or furnished by CFI, and shall at the time of the giving of such profit and loss statement pay to CFI the percentage mentioned above. In addition, CFI may require the Operator to furnish to CFI each week a statement of gross receipts and wages paid on a form approved or provided by CFI.

12. Supplies. The Operator will use only such supplies and ingredients as comply with the standards as set forth in the Manual. The Operator shall purchase from The Company all of the Operator's requirements of the following ingredients:

TACO TIME Meat Spice Mix
TACO TIME Hot Sauce Spice Mix
TACO TIME Hot Sauce Vegetable Mix

It is understood that the foregoing ingredients are essential to the uniformity and quality of the products of "TACO TIME" restaurants, are premixed, and the recipes therefore and ingredients thereon are

trade secrets. The Operator will make payment to The Company for all purchases from it in cash upon delivery at the Operator's place of business. These ingredients shall not be removed from the premises described in paragraph 1 hereof and shall not be resold or used in any manner other than as an ingredient in menu items.

13. Assignment. CFI is entering into this agreement and The Company has approved the same based upon its knowledge and faith in the ability and background of the Operator. Therefore, this agreement is personal to the Operator and may not be assigned by the Operator without first having received the written consent of CFI and The Company. Any attempt at assignment hereof shall be absolutely null and void and shall give to CFI the right to cancel this agreement, in addition to any remedies which CFI may have for the breach of this covenant by reason of such attempted assignment.

14. Sale of Business. In the event the Operator receives a bona fide offer to purchase his business, CFI shall have a sixty (60) day first refusal option to purchase the business at the price and upon the terms specified in such offer. If CFI does not exercise its option, CFI and The Company will consent to the sale thereof to any responsible buyer who meets The Company's then qualifications of an Operator provided:

(a) The purchaser has a satisfactory credit rating and is of good moral character;

(b) The purchaser is willing to take CFI training to such extent as CFI in its sole discretion, deems necessary or desirable, and pays to CFI the sum of One Thousand Dollars ($1,000) for such training;

(c) Shall enter into all agreements that The Company is at that time requiring of new Operators; and

(d) All obligations of the Operator hereunder are fully paid and satisfied, and the Operator is not in default under any of the provisions of this agreement.

15. Confidential Information. The Operator acknowledges that much of the information imparted to the Operator by CFI and The Company in the Operator's business is confidential and shall remain

the sole and exclusive property of The Company. During the term of this agreement and for a period of five (5) years thereafter, the Operator will not disclose any information received by the Operator from CFI or The Company or from their representatives, except as may be necessary to successfully operate the herein franchised business of the Operator. All materials such as manuals, recipes, menus, brochures and the like shall remain the property of The Company and shall be returned to The Company by the Operator upon the termination of this agreement for any reason. Whenever requested by CFI the Operator will obtain commitments in writing upon forms approved by CFI from employees of the Operator who, by virtue of such employment, may obtain information concerning the confidential information mentioned herein, binding such employees not to disclose the same, except as may be authorized in such agreement.

16. Indemnity. Operator will indemnify and save The Company and CFI harmless from and against all fines, suits, proceedings, claims, causes of action, demands or liabilities of any kind or of any nature arising out of or in connection with the construction or operation of the Operator's "TACO TIME" restaurant. The Operator shall at all times keep in force public liability insurance insuring CFI, The Company, and the Operator, with limits as may be from time to time prescribed by The Company, but not less than One Hundred Thousand Dollars ($100,000) for bodily injury to one person, Three Hundred Thousand Dollars ($300,000) for bodily injury in one accident, and Fifty Thousand Dollars ($50,000) for property damage. Such insurance shall expressly cover products liability, with the limits for bodily injury as set forth above. Copies of such policy or policies and proof of payment of premiums, together with proof of renewals thereof, will be promptly furnished to The Company and to CFI. All such policies shall contain provisions to the effect that the same can be cancelled only after not less than ten (10) days' written notice to The Company and to CFI.

17. Independent Contractor. The relationship between CFI, The Company, and the Operator is that of independent contractors and Operator is in no way to be deemed a partner, joint venturer, agent or servant of either CFI or of The Company. The Operator shall not have authority to bind either The Company or CFI to any contractual obligation or incur any liability for or on behalf of The Company or CFI.

18. Advertising. At all times the Operator will conduct

the business which is the subject of this franchise under the name "TACO TIME" and will advertise his "TACO TIME" restaurant and its services on a scale consistent with the volume of his business and in keeping with practical business practices. In so advertising, the Operator will utilize all advertising formats, formulas, and programs furnished to the Operator by CFI. It is understood that CFI may desire to cause Operators in a given area to join into a uniform program of promoting given products or services either through sales, discounts, specials or other promotional devices. The Operator will participate in any such procedures upon the request of CFI.

19. Hours of Operation. The Operator will keep his "TACO TIME" restaurant open for business to the public and lighted and staffed during such hours as CFI may from time to time designate in writing, but not less than eight (8) hours a day each day of the year, except Sundays and holidays.

20. Termination. Should the Operator in any manner default in or breach any of the terms or provisions herein contained and fail to rectify such after thirty (30) days' written notice thereof from either CFI or The Company to the Operator, either The Company or CFI shall have the right and option at any time thereafter to terminate this agreement. Upon such termination, the Operator will return to CFI all recipes, manuals, menus, brochures and other information delivered to the Operator theretofore by The Company or by CFI and shall forthwith cease utilizing the name "TACO TIME" in connection with the operation of his business. All design, insignia and other material relating to the unique system developed by The Company shall not be thereafter utilized by the Operator in connection with his business or any other business. In the event the Operator should fail to cease the use of any of the items herein mentioned, The Company or CFI may enter the Operator's premises without being guilty of trespass or any other tort and remove and retain the same. Any expense incurred by The Company or by CFI in removing any such signs, insignia or other material from the Operator's premises shall be paid to The Company or to CFI by the Operator upon demand, together with interest upon such expenses at the highest lawful rate from the date of expenditure until paid. The Company and CFI shall have any other remedy for a breach hereof available at law or in equity.

21. Corporate Entity. Should the Operator be a corporation,

there shall be no change in the present ownership of the stock of the Operator without the prior written consent of The Company and of CFI. In the event any such change in ownership is other than for the purpose of a bona fide sale of such stock to an unrelated third party, such consent shall not be unreasonably withheld by The Company or by CFI. In the event the contemplated change in ownership is the result of an intended bona fide sale to an unrelated third party, the provisions of paragraph 13 hereof shall apply. Change in ownership shall be deemed to include the transfer of stock now issued and outstanding and the issuance of new stock, whether the same constitutes treasury stock or otherwise. The Operator agrees that there shall be placed on the face of each of its stock certificates a reference to the restrictions on transfer contained herein. The Operator may not use the words "TACO TIME" in its corporate name and shall not make any public offering of its stock or other securities without first receiving the written consent of The Company and of CFI.

22. Use of Name. If applicable local law requires the Operator to file or record the name "TACO TIME" or any name containing those words to enable the Operator to conduct the franchised outlet utilizing that name, The Company and CFI will, if necessary, execute appropriate consents thereto. No such consent shall be construed as a relinquishment of The Company's exclusive ownership in the name "TACO TIME," but shall be given only to permit the Operator to comply with applicable local law regarding the use of assumed or fictitious business names. The Operator will, whenever requested by The Company, consent to the filing or recording by The Company or by other franchisees or licensees of The Company or of CFI of the name "TACO TIME," so as to enable operation of other restaurants using the name "TACO TIME" so long as no such other restaurant is located within the geographical area set forth in paragraph 1 hereof. Upon the expiration of the term of this agreement, upon the expiration of any renewal term hereof, and upon the termination or cancellation of this agreement for any cause, the Operator will, upon The Company's request, execute and cause to be properly filed and recorded any and all documents necessary or desirable to effect the cancellation and termination by the Operator of any filing or recording by the Operator of any document containing the words "TACO TIME".

23. Lease Assignment. Upon the termination of this

agreement for any reason, the Operator will assign to CFI on demand the lease, if any, covering the premises from and upon which the Operator has operated the "TACO TIME" restaurant which is the subject hereof.

24. Remedies. It is agreed that should the Operator breach any of the terms or provisions of this agreement (other than those calling for the payment of money only), CFI may enforce the same by injunction, specific performance or other similar remedy. However, such remedies are not exclusive and CFI may utilize any other remedy available to it.

25. Trademarks and Trade Names. The Operator acknowledges The Company's ownership of and rights to The Company's current and future trademarks, trade names, trade secrets, and to all practices, procedures, methods, devices, manuals, slogans, and other material constituting an element of the "TACO TIME" system. The Operator will not contest at any time during or after the term of this agreement, in any manner, the validity of The Company's exclusive ownership of and rights to any of the above-mentioned items, whether now existing or hereafter created or obtained. The Operator shall immediately refer to The Company any infringement of or challenge to the validity or ownership of the name "TACO TIME" any derivative name, or The Company's trademarks, trade names or copyrights, together with any unfair competition which interferes with the relationship of the parties hereto or the relationship between The Company and other franchisees. Such notification shall contain all details concerning such infringements or unfair competition that are available to the Operator. The Company shall have complete control over the same. The Operator will cooperate with The Company to the extent necessary in connection with any such infringement, unfair competition or litigation.

26. Paper and Related Products. To insure the proper and effective use of The Company's trademarks, copyrights, trade names and systems, the Operator will use paper and related products bearing the trade names, copyrights or trademarks of the Company to the extent and in the manner specified from time to time by The Company.

27. Nature of Liability. In the event the Operator consists of two or more persons, such persons shall be jointly and severally

liable under the provisions of this agreement.

28. Illegality. This agreement is a general form intended for use throughout the United States and in the event any of the terms, covenants or provisions herein contained violate or contravene the laws of any state or territory, such provisions shall be deemed not a part of this agreement, and the remainder of this agreement shall remain in full force and effect.

29. Notices. All notices herein specified shall be in writing and sent by certified mail with return receipt requested to The Company at 3880 West 11th Ave., P.O. Box 2056, Eugene, Oregon, 97402, to CFI at 3745 So. 250 W., P.O. Box 9255, Ogden, Utah, 84409, or as The Company or CFI, as the case may be, may designate in writing, and to the Operator at the address of the "TACO TIME" restaurant to be established by him as above set forth.

30. Interpretation. All of the covenants, agreements, conditions and terms contained in this contract shall be binding upon, apply and inure to the benefit of the successors and assigns of the respective parties hereto. Nothing in this paragraph shall, however, be construed as a consent by The Company or by CFI to the assignment of this agreement by the Operator.

31. Waiver. Failure of CFI to insist upon the strict performance of any term, covenant, or condition in this agreement contained shall not constitute or be construed as a waiver or relinquishment of the right of CFI to thereafter enforce any such term, covenant or condition and the same shall continue in full force and effect.

32. Litigation Expense. In the event that an action at law or suit in equity is brought to establish, obtain or enforce any right by either of the parties to this agreement, the prevailing party in such suit or action, both in the trial and appellate courts, shall be entitled to a reasonable attorney's fee to be recovered from the other party as well as that party's costs and disbursements incurred in such suit or action.

33. Applicable Law. The law of the State of Utah shall govern all of the rights and duties of the parties under the provisions of this agreement.

34. Area License. CFI has entered into this agreement as the area licensor of The Company. If for any reason the relationship between The Company and CFI is terminated or otherwise ceases and The Company notifies the Operator thereof in writing, then this agreement shall be deemed to be between the Operator and The Company only and The Company shall have all of the rights and duties of CFI hereunder from and after the giving of such notice, including but not limited to the right to receive any and all moneys then or thereafter owing hereunder by the Operator to CFI. The Operator shall rely upon such written notice and shall be under no obligation to make inquiry or to investigate the validity or existence of such termination or cessation. The Company does indemnify and hold the Operator harmless from and against any liability or damages as a result of the Operator's recognition of and adherence to the provisions of this paragraph.

35. Entire Agreement. This agreement constitutes the entire agreement of the parties (into which all prior negotiations, commitments, representations, and undertakings with respect to the subject matter hereof are merged) and there are no oral or other written understandings or agreements between the parties hereto relating to the subject matter hereof.

DATED this 4th day of May, 19 77.

CRAIG FOOD INDUSTRIES, INC.

By _____
Its President

OPERATOR

George H. Weihing
George H. Weihing

APPROVED this 2nd day of

August, 1977.

TACO TIME INTERNATIONAL, INC.

By _____
Its President

EXHIBIT "A" TO FRANCHISE AGREEMENT

between CRAIG FOOD INDUSTRIES, INC. and

George H. Weihing

"operator"

as referred to in paragraph 1 of such franchise agreement (page 2).

AREA DESCRIPTION: The protected franchise area granted to Green River Taco Time at the address in this franchise agreement will be a five mile radius from said address.